90-1963

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

NICHOLAS DAMER,

Petitioner,

v.

SUPERIOR COURT IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

GERALD C. STERNS; LAW OFFICES OF GERALD C. STERNS, A California Professional Corporation; JOHN C. ELSTEAD; ELIZABETH W. WALKER; WEIL ADJUSTERS AND CONSULTANTS, INC., A California Corporation; LAWYERS MUTUAL INSURANCE COMPANY, A Corporation; GERSON MEHLMAN; and ROBERT DENEBEIM,

Real Parties in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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In Propria Persona

QUESTIONS PRESENTED:

I. WHETHER ANY LAWYER'S ENTIRELY PRIVATE, CONFIDENTIAL PAPERS, AND ALL COPIES OF THOSE FILES, MAY BE SEIZED BY A TRIAL COURT PURSUANT TO A PURPORTED PURCHASE OF THOSE DOCUMENTS, BY THE LAWYER'S VERY ADVERSARIES, INTEGRAL TO A SECRET SETTLEMENT THE LAWYER OPPOSED

II. WHETHER A LAWYER'S TRUTHFUL ACTS OF SPEECH, AFTER CONCLUSION OF A HIGHLY PUBLICIZED CIVIL JURY TRIAL, MAY BE PUNISHED BY CIVIL OR CRIMINAL CONTEMPT, PARTICULARLY WHERE THOSE ACTS WERE INTEGRAL TO PETITIONS, TO OTHER AND HIGHER STATE COURTS, FOR THE REDRESS OF GRIEVANCES AND FOR PROMOTION OF VALID PUBLIC AND PRIVATE INTERESTS

III. WHETHER A TRIAL COURT'S DELIBERATE PRECLUSION OF ANY APPELLATE REMEDY TO STAY A SUMMARY ORAL ORDER OF TOTAL FILE DISPOSSESSION, THE DENIAL OF REVIEW OF THE VALIDITY OF THAT ORDER AT THE RELATED SUBSEQUENT CRIMINAL CONTEMPT HEARING, THE DENIAL OF A JURY TRIAL AT THE SAME CONTEMPT HEARING, THE DENIAL OF ANY CROSS-EXAMINATION OF THE ACCUSERS AT THE SAME CONTEMPT HEARING, AND THE DENIAL OF ANY ESTABLISHED APPELLATE REMEDY FROM THE RESULTING CIVIL AND CRIMINAL CONTEMPT JUDGMENT, SYSTEMATICALLY VIOLATED AN ALLEGED CIVIL AND CRIMINAL CONTEMNOR'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION

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GERALD C. STERNS; LAW OFFICES OF GERALD C. STERNS, A California Professional Corporation; JOHN C. ELSTEAD; ELIZABETH W. WALKER; WEIL ADJUSTERS AND CONSULTANTS, INC., A California Corporation; LAWYERS MUTUAL INSURANCE COMPANY, A Corporation; GERSON MEHLMAN; and ROBERT DENEBEIM,

Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner Damer respectfully urges this Honorable Court to grant this Petition for Writ of Certiorari, seeking review of the contempt judgment entered against him and based upon the Orders to Show Cause filed on May 25, 1990 in the Superior Court in and for the City and County of San Francisco, California. A challenge to the judgment of contempt was presented to the California Supreme Court, which, by order filed on March 28, 1991, denied review.

Justice Stanley Mosk, most senior in tenure, was "of the opinion that the petition should be granted."

PROCEEDINGS BELOW

The instant controversy arises from unusual unprecedented secrecy concessions which Real Parties demanded as part of an

in-court settlement of a legal malpractice action brought by Plaintiff Maria Seward against Real Parties Gerald C. Sterns, John C. Elstead, their malpractice insurer Lawyers' Mutual Insurance Company and other named defendants in San Francisco Superior Court Civil Action No. 826241. The suit alleged breach of contract of legal representation, failure to follow the proper standard of care, conflict of interest, negligent and fraudulent breaches of fiduciary duty, and conversion/ spoliation of evidence. Mr. Damer had been Plaintiff's lawyer for over five years preceding the commencement of the trial in January, 1990; he withdrew as counsel on March 7, 1990, believing he could not ethically endorse the broad confidentiality terms of the settlement arrangement.

On Tuesday, March 6, 1990, after 5:30 p.m., following Damer's departure from the courthouse, his recently associated co-

counsel, Denebeim and Mehlman, along with lawyers for the defendants and Real Parties Sterns et al., personally continued settlement talks -- against Mr. Damer's recommendation and advice as to the timing and circumstances of such negotiations.

A tentative settlement was reached at approximately 10:00 p.m. that same evening. The settlement was put on the trial court record the next morning, on March 7, 1990. The arrangement included, over Mr. Damer's protests, a purported sale, to Mr. Damer's adversaries, of his confidential, private case and investigation files and all copies thereof.

The settlement also contained other terms likewise designed to preserve secrecy and suppress evidence. Damer felt these were illegal, unethical and unconstitutional.

For example, the settlement not only included an indefinitely enduring order that Damer's adversaries would characterize as a

"gag" order on the jury and all participants in the trial, but the agreement also initially required Damer to transfer, directly to Real Parties, all of Damer's case files, including attorney work product, confidential communications from informants, and evidence of conduct that Real Parties' own internal office memo described as "tacky," "unethical," and "stealing" from clients (see Appendix C.) [1] After hearing arguments extending intermittently over a three-day period, the trial court maintained its gag order and orally ordered Mr. Damer's files transferred to a receiver nominated by Damer's adversaries.

For a brief time on March 7, Damer was taken into custody, at the trial judge's direction, when Damer stated he could not and would not comply with the settlement provisions requiring surrender of his files.

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[1]Real Parties desperately needed to suppress this memo since it tended to corroborate identical characterizations of their actions in suits pending in the neighboring Contra Costa County Superior Court.

The Court quickly released Mr. Damer from custody, but later warned him that he would be jailed indefinitely if he refused to comply with the "gag" and dispossession orders. On Friday, March 9, 1990, at 5:30 p.m., on the third afternoon of arguments, Respondent Court issued an oral order which required Damer to produce and surrender custody of his files and all copies thereof by 9:00 a.m. on Monday, March 12, 1990. The order was consciously designed to deny any appellate review over the weekend, which review was an impossibility while appellate courts were closed; Mr. Damer was denied due process. The Court had deliberately framed an order with no appeal possible.

Constitutional challenges to the contempt judgment were presented to the California Supreme Court, which in its order filed March 28, 1991 denied any review. (See Appendix E, an extract of Damer's Petition.)

Justice Stanley Mosk was "of the opinion that the petition should be granted."

JURISDICTION

28 United States Code §1257(a) provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari ... where any title, right, privilege, or immunity is specially set up or claimed under the Constitution."

Mr. Damer has raised below, and preserved, challenges under the United States Constitution, Amendments 1, 5, 6, and 14 (in the California Supreme Court and the required lower state courts.)

CONSTITUTIONAL PROVISIONS INVOLVED (emphasized below)

The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

And, the first section of the Fourteenth Amendment provides:

> **"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."**

STATEMENT OF THE CASE

A. Summary of Proceedings Below

On August 24, 1990, a second judge (i.e., not the judge who ordered summary dispossession) found Mr. Damer guilty of three counts of contempt, which were described in the underlying Order to Show Cause as follows:

"1. In civil and criminal contempt of court for your failure to comply with the provisions of the March 9, 1990, Order of Judge Alfred G. Chiantelli, requiring you to turn over the file of Seward vs. Peters, and the file which was prepared in this action, and all copies of all documents which constitute those files, to the Honorable [Retired] James B. Scott at 9:00 a.m. on March 12, 1990, at the law offices of Damer & Stryker, 30 Avenue Portola, El Granada, CA 94018..."

"3. In criminal contempt of court for willfully disobeying the confidentiality provisions of the Order of Honorable Alfred G. Chiantelli made on March 9, 1990, in the above specified action, as specified in paragraph No. 2 above, in that you filed [on March 30, 1990] a petition for writ of mandate, together with exhibits, with the Court of Appeal for the State of California, First Appellate District, Division 4 [seeking to arrest the first pending contempt proceedings and to preserve Mr. Damer's possession of his files], without that petition being filed under seal;

"4. In criminal contempt of court for willfully disobeying the confidentiality provisions of the order of the Honorable Alfred G. Chiantelli made on March 9, 1990, in the above entitled action, as specified in paragraph No. 2 above, in that you filed a notice of motion for an order

granting a lien on [for] attorneys [fees], together with supporting memorandum of points and authorities and exhibits, in a case entitled In Re Sun Valley Air Crash Disaster, in the Superior Court of the State of California, in and for the County of Contra Costa, Coordination Proceedings Special Title (CRC1550(b)), without those papers being filed under seal..."

(Mr. Damer was found Not Guilty of three other charges of contempt. It is Mr. Damer's contention that the criminal nature of the contempt charges was diminished to civil contempt by colloquy at the hearing held on August 24, 1990, but no relief has been granted, to date, in this regard.)

The findings and judgment of contempt, and contentions about Damer's rights under the U. S. Constitution, were presented to the California Supreme Court, which, by order filed on March 28, 1991, denied the petition for discretionary review.

Justice Mosk was "of the opinion that the petition should be granted."

B. Facts Pertinent to a Determination of this Petition

This is an urgent, serious situation. The California courts have a profoundly similar precedent, but have refused to apply it in Mr. Damer's case. Although in 1983 a California Court of Appeal set aside a secrecy pact designed to shield a doctor's misdeeds,[2] when Damer uncovered a fellow lawyer's misconduct, the California judiciary involved herein in 1990 and 1991 actively and passively decreed tacit approval of sweeping confidential settlements and sealing orders.

Mary Spasaro had sued her doctor who exploited her sexually. When the offending physician was investigated, the inquiry was extensively delayed and badly obstructed.

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[2] In Re Mary R. [Spasaro] v. R&B [Medical] Corp., 149 Cal. App. 3d 308, 196 Cal. Rptr. 871 (1983), discussed infra (next paragraph).

The defendant physician ingeniously utilized a "confidentiality" agreement, obtained from his former minor patient, Mary Spasaro, in return for a substantial payment, and did so with the involvement, approval, and enforcement power of a Superior Court judge.

The same judge later denied the Board of Medical Quality Assurance requests to see the court's sealed records and allow the victim to be interviewed. But eventually, in the first and only published California case dealing with an attempted cover-up of a professional's systematic malpractice, a higher court held, in In Re Mary R., supra, that such "confidentiality" agreements or secrecy stipulations were almost always void and invalid, especially when their apparent purpose and obvious effect was to in any way impede or interfere with the timely investigation, prevention or redress of the involved professional's misconduct.

But the precedent of Mary R. did not convince the judges below to void the gag order in the present case. Note that in the present case what Mr. Damer's adversaries characterize as a "secrecy" arrangement was far more sweeping than that in Mary R.

The instant controversy arises from wholly unusual and unprecedented secrecy concessions which Real Parties demanded as part of the in-court settlement of a legal malpractice action brought by Plaintiff Maria Seward against Real Parties Gerald C. Sterns, John C. Elstead, their errors and omissions liability underwriter, Lawyers Mutual Insurance Company, and various other named defendants in San Francisco Superior Court Action No. 826241. The suit alleged spoliation of evidence, and negligent and fraudulent breaches of fiduciary duty in connection with a prior personal injury suit against Thomas Peters, the nationally known

author of In Search of Excellence, filed as an aftermath of a head-on vehicular crash in the California wine country where the shattered bodies of Seward and her auto's driver were found in their automobile, and empty beer bottles and other evidence of "driving under the influence" were discovered in Peters' car. (In what even the Encyclopedia Britannica analyzes as an obvious conflict of interest, Sterns' firm tried to serve as counsel for both Seward and her driver, Charles Higgins.)[3]

Damer had been Plaintiff's lawyer for over five years before the legal malpractice trial began in January, 1990; he withdrew as counsel on March 7, believing he could not ethically endorse the confidentiality terms here under review. The trial commenced on January 29, 1990, the Honorable Alfred G. Chiantelli presiding. After the trial started, Plaintiff Seward was also represented by

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[3] Volume 22, 15th Edition, 1987, page 859; Sterns' firm then sued Higgins for his negligence.

Damer's co-counsel, Gerson Mehlman and Robert Denebeim, who had only just joined with Damer well after the trial began. A document reflecting the specifically agreed limitations on Mr. Denebeim's role -- his own letter -- is attached as Appendix D.

On Tuesday, March 6, 1990, and after 5:30 p.m., following Mr. Damer's departure from the courthouse, his recently associated co-counsel, Denebeim and Mehlman, along with several lawyers for other Real Parties (Defendants Sterns et al.) continued with settlement discussions -- against Mr. Damer's instructions and advice regarding the timing and circumstances of such negotiations.

A tentative settlement was reached at approximately 10:00 p.m. that evening. Again, the subject pact of total secrecy was negotiated on behalf of Plaintiff exclusively by Damer's co-counsel and totally without Damer's presence, knowledge or consent.

The settlement was put on the record early on Wednesday morning, March 7, 1990. Damer criticized the purely financial aspects of the settlement, but did not attempt to interfere with those normal provisions allowing for mutual dismissals and prompt payment of $750,000.00, a sum the trial judge recommended and the Plaintiff accepted.

The settlement, however, contained sweeping and unprecedented confidentiality terms that Mr. Damer believed to be illegal, unethical, and unconstitutional and which were plainly contrary to his client's recent written, signed directions. For example, not only did the settlement involve a broad and apparently perpetual post-trial gag order, but the agreement also initially required Damer to transfer directly to Real Parties all of Damer's case files, including attorney work product, confidential communications, and miscellaneous papers Damer claimed were

evidence and admissions of Real Parties' extensive embezzlements of hundreds or even thousands of Real Parties' clients and beneficiaries. After arguments extended intermittently over a three-day period, the Court continued its pre-trial gag order and, despite Real Parties' contrary preferences, instead orally ordered Mr. Damer's files transferred to Real Parties' "receiver".

For a brief time on March 7, Damer was taken into custody, by the bailiff and at the Court's direction, when Mr. Damer announced he could not and would not comply with the secret provisions of the settlement and could not and would not, then or thereafter, turn over all the documents Real Parties desired to obtain. The Court did quickly release Mr. Damer, but later warned him that he would again face jail if he refused to comply with the dispossession order by March 12, 1990.

On Friday, March 9, 1990, at 5:30 p.m., Respondent Court issued an oral directive requiring Damer to surrender custody of his confidential files and all copies thereof by 9:00 a.m. on Monday, March 12, 1990, or be then in contempt. Appellate review over the weekend was impossible, as the trial judge was well aware from not only Damer's many entreaties, but also from his adversaries' arguments for denial of any stay or any delay whatsoever. The Court thus purposefully framed an order with no appellate remedy.

Per the trial court's orders, Damer is prohibited from keeping any of his files and any evidentiary materials he obtained, or even any copies of any such papers, despite the fact that the items are attorney work product and would reveal many confidences, imparted to Damer alone, and proof of acts, by Real Parties, forbidden by the California Penal and Business and Professions Codes.

These papers include: (1) what Damer claims is irrefutable proof of premeditated, covert misappropriation of over $2,500.00, by at least two of the Real Parties, from their and Damer's former client's recovery in her suit against celebrity author and lecturer Thomas Peters; and (2) what Damer claims are admissions of a broad scheme of similar misappropriations affecting hundreds or thousands of other clients. Pursuant to the order, Real Parties and their counsel -- Mr. Damer's adversaries for the entire trial -- were permitted, on motion, contact with the proposed custodian of these files and even access to all these materials for any purpose found proper by a trial judge who approved the secret settlement. The same judge, when he deemed it timely, could order "all files shredded," in the very words he himself employed. Thus Damer urgently needs assistance from this Court via a certiorari writ.

On April 4, 1990, the Superior Court for the County of San Francisco filed an ORDER: RE SETTLEMENT AGREEMENT, reciting settlement terms which Mr. Damer (and some but not all Real Parties) had opposed in hearings on March 7, 8, and 9. The order confirmed the March 9 dispossession and "shredding" provisions.

On April 5, 1990, the Superior Court, by Judge Chiantelli, began the first contempt proceeding against Mr. Damer, faulting only Mr. Damer's failure "to turn over [his] ... entire file from this case [Seward v. Sterns] and the underlying case of Seward v. Peters ... <u>including all [Mr. Damer's] copies of documents contained in those files,</u> [emphasis supplied] to ... a receiver appointed [on March 9 at 5:30 p.m.] by this court, at 9:00 a.m. on March 12, 1990, at [Mr. Damer's] law offices..."

April 20, 1990 was the scheduled date for the contempt hearing. Damer had filed a PETITION FOR WRIT OF MANDATE, PROHIBITION, CERTIORARI OR OTHER APPROPRIATE RELIEF on March 30 with the California Court of Appeal, after notifying its clerk of the "sealing" and "gag" provisions of the settlement.

On April 11, 1990, the Court of Appeal issued this short order: "Petitioner not having been [yet] held in contempt, the petition is denied as premature."

By an order signed April 24 and then filed ten days later, Judge Hatch (specially assigned) dismissed the April 5 Order to Show Cause without prejudice on grounds the Order had not been properly served.

On April 27, the original trial judge, Judge Chiantelli, held a related hearing requested by the Coalition For The First Amendment, intervening to vacate gag

provisions of the April 4 order (final rulings were filed in June, perpetuating the post-trial "gag" order on Mr. Damer, releasing it as to jurors, and continuing to facilitate the destruction of evidence of wrongdoing by various of the Real Parties).

On May 25, 1990, Judge Hatch issued a second Order to Show Cause Re Contempt.

The first of Mr. Damer's alleged contumacious acts was the same conduct assailed in April -- the March 12 failure to give up papers that were Damer's "files and all [Mr. Damer's] copies [to be sequestered and eventually shredded.]" This was claimed to be both criminal and civil contempt. Other contempts were acts claimed to be solely criminal contempts, as a supporting DECLARATION OF ROBERT C. GEBHARDT RE CONTEMPT asserted there had existed on March 9, 1990 "an order directing [Mr. Damer] ... to refrain from

discussing this case or the settlement thereof with the press or with any other person pending further order of this [Superior] Court". These other contempts were the filing of the petition in the Court of Appeal (on March 30, 1990) and filing of "a notice of motion for an order granting a lien on [for] attorneys [fees], together with supporting memorandum of points and authorities and exhibits, in a case entitled In Re Sun Valley Air Crash Disaster, in the Superior Court of the State of California, in and for the County of Contra Costa ... without those papers being filed under seal" (¶4 of the OSC). (The filing of the Notice of Motion could have put Sterns' clients, in the Sun Valley case, on notice of the same pattern of overcharging evident from the materials suppressed in the Seward case — namely, assessing what Sterns' own partner called "phony case costs." See Appendix C.)

No such "gag" or dispossession order was ever entered into the minutes of the Superior Court in March, 1990 (despite the mandate of Local Rule 6.8 to "keep minutes of Court orders ... in a minute book") nor did any such order ever become formally memorialized or served prior to Damer's alleged violations for which he was cited. On August 10, 1990, Judge Leighton Hatch (who neither authored nor endorsed alleged orders that Damer was accused of violating) announced, at the second contempt hearing, that no review of the validity of any such orders was within Judge Hatch's authority. On August 24, 1990, Judge Hatch reaffirmed this neutral position, and said he would not "serve as a court of appellate review of [the] trial judge ['s] conduct or orders", and would instead "proceed to treat the orders as valid." Judge Hatch then formulaically found Damer "guilty" of three of six charges of contempt.

The findings made complied literally with the elements required under California law. The specifications of "guilty" were recited by "count" number only; the underlying Order to Show Cause, drafted by Real Parties, had listed the involved charges as follows:

"1. In civil and criminal contempt of court for your failure to comply with the provisions of the March 9, 1990, Order of Judge Alfred G. Chiantelli, requiring you to turn over the file of Seward vs. Peters, and the file which was prepared in this action, and all copies of all documents which constitute those files, to the Honorable [Retired] James B. Scott [Real Parties' specified "receiver"] at 9:00 a.m. on March 12, 1990, at the law offices of Damer & Stryker, 30 Avenue Portola, El Granada, CA 94018;...

"3. In criminal contempt of court for willfully disobeying the confidentiality provisions of the Order of Honorable Alfred

G. Chiantelli made on March 9, 1990, in the above specified action, as specified in paragraph No. 2 above, in that you filed a petition for writ of mandate [to bar attempts to enforce the March 9 dispossession order], together with exhibits, with the Court of Appeal for the State of California, First Appellate District, Division 4, without that petition being filed under seal;

"4. In criminal contempt of court for willfully disobeying the confidentiality provisions of the order of the Honorable Alfred G. Chiantelli made on March 9, 1990, in the above entitled action, as specified in paragraph No. 2 above, in that you filed a notice of motion for an order granting a lien on [for] attorneys [fees], together with supporting memorandum of points and authorities and exhibits, in a case entitled In Re Sun Valley Air Crash Disaster, in the Superior Court of the State of California, in

and for the County of Contra Costa, Coordination Proceedings Special Title (CRC1550(b)), without those papers being filed under seal..."

To prevent Mr. Damer from presenting an effective petition to the Court of Appeal in March (i.e., to bar further prosecution of any dispossession, "gag," or contempt order) the trial judge had even denied Damer a copy of the transcript of the proceedings concerning the gag and dispossession orders. Judge Hatch, however, ordered that Damer be provided these items, along with a copy of the August 10 and August 24 transcripts, and allowed Damer extra time to present a second petition for a writ, to the California Court of Appeal, whereby the validity of the March 1990 orders could be challenged along with the resulting judgment of contempt. The judgment, and its effect on Damer's constitutional rights, were left unaddressed

by the California Supreme Court, which on March 28, 1991 denied any review.

Justice Mosk, the Court's longest tenured member, wished to grant review.

REASONS TO GRANT THIS PETITION

The proceedings below violated Mr. Damer's rights under the First, Fourth, Fifth, Sixth, and Fourteenth Amendments. The employment of civil and criminal contempt proceedings, to enforce secret settlements requiring dissenting counsel to be perpetually subject to restrictions of his or her freedom of speech, to forfeit the right of petitioning for redress of his or her grievances, to surrender all copies of his or her work product, to risk the revelation of all confidential sources, and to effect the destruction of vital evidence, should be held by this Court to be unconstitutional per se.

ARGUMENT

I. THE ENTIRETY OF A LAWYER'S PRIVATE AND CONFIDENTIAL PAPERS, AND THE LAWYERS' COPIES OF THOSE FILES, MAY NOT BE SEIZED BY A TRIAL COURT PURSUANT TO A PURPORTED PURCHASE OF THOSE DOCUMENTS, BY THE LAWYER'S VERY ADVERSARIES, IN A SALE INTEGRAL TO A SECRET SETTLEMENT THE LAWYER OPPOSED

Every lawyer requires privacy and freedom to prepare his or her case and in order to practice law effectively. "In performing his various duties, ... it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." Hickman v. Taylor, 329 U.S. 495, 510, 67 S. Ct. 385, 91 L.Ed.2d 451 (1947). Therein it was held that attorney work product is privileged from discovery.

In this instant case, the trial court ignored the privilege afforded an attorney's work product from discovery by his adversaries, and instead ordered that Mr. Damer surrender his file and all copies of papers from his file, pursuant to a settlement whose provisions he had never made. Though such orders were not countermanded by Courts of Appeal or the Supreme Court of California, it is the function of the Supreme Court of the United States to supervise the nation's trial courts, to relieve Mr. Damer from the taint of contempt findings and imposition of sanctions, fines, and imprisonment, and to reverse orders to forfeit Mr. Damer's file. No servant, however lowly, of this nation's courts, should be subject to such abuse:

"[P]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them..." Bantam Books, Inc. v. Sullivan, **372 U.S. 58, 68 (1963).**

II. TRUTHFUL ACTS OF SPEECH BY A LAWYER, AFTER THE CONCLUSION OF A PUBLICIZED CIVIL TRIAL, MAY NOT BE PUNISHED, BY CIVIL OR CRIMINAL CONTEMPT, WHERE THE SPEECH ACTS ARE PART OF LAWFUL PETITIONS FOR REDRESS, TO OTHER AND HIGHER STATE COURTS, TO PROMOTE VALID PUBLIC AND PERSONAL INTERESTS

Nicholas Damer faces imprisonment if his First Amendment rights are not fully vindicated by this Court. Mr. Damer will not violate confidentiality conferred on informants and forfeit his work product. State actions that inflict criminal penalties for truthful speech are held presumptively unconstitutional. The state must prove that its interest is crucial in order to overcome the presumption of unconstitutionality.

California, and the parties seeking to uphold the court's action, cannot overcome the presumption. There is no reported case that concerns the situation Mr. Damer faces: imprisonment or confiscation of his case files, and subjection to a perpetual gag order entered pursuant to a settlement whose terms he never formulated, approved nor endorsed. Indeed, there is no reported decision supporting the terms of the settlement which require surrender of a lawyer's personal files and submission to a perpetual gag order.

A lawyer's speech is protected under the Constitution the same as any other citizen's. Commercial speech by attorneys -- e.g., advertising -- is protected. See Bates v. State Bar of Arizona, 433 U.S. 350 (1977) and Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988). Surely non-commercial speech acts of attorneys, meant to prevent suppression of evidence of malfeasance, are protected.

"[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards." Smith v. Daily Mail Pub. Co., 443 U.S. 97, 102 (1979). While prior restraint of speech is rarely tolerated, state action which imposes criminal penalties for truthful speech is treated no better. Id. at 101-102. "Whether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity." Id. at 102. [4]

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[4]An inapplicable exception was enunciated in one case, Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984). The holding in Seattle Times is completely inapposite here, and dealt with the fruits of pretrial civil discovery, and is limited to that sole context: "We ... hold that where, as in this case, a protective order [forbidding the Seattle Times from publishing what it had learned of Rhinehart's religious affiliates in the course of a lawsuit between the Times and Rhinehart] is entered on a showing of good

State action criminalizing truthful speech carries a "heavy burden." See New York Times Co. v. United States, 403 U.S. 713, 714 (1971). To surmount its heavy burden, the State must prove that its need is urgent. Smith v. Daily Mail Pub. Co., 443 U.S. 97, 101-02 (1979). There must be a clear and present danger, an immediate menace. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845 (1978); Craig v. Harney, 331 U.S. 367, 376 (1947). Duly petitioning a governmental agency (namely, a court of record) for redress of grievances -- conduct which itself is constitutionally protected by the First Amendment -- can hardly be held to be a menace to any legitimate interest.

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cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information gained from other sources, it does not offend the First Amendment." Id. at 37. The items Damer seeks to preserve is what he gathered independently and not through court-ordered discovery as in Rhinehart.

The state's interest in raising revenue is not a sufficiently compelling state interest to justify imposing criminal penalties for truthful speech. Minneapolis Star & Tribune Co. v. Minnesota Comr. of Revenue, 460 U.S. 575 (1983). The state's interest in preserving the anonymity of its juvenile offenders is not enough. Smith v. Daily Mail Pub. Co., 443 U.S. 97 (1979); Oklahoma Pub. Co. v. District Court of Oklahoma, 430 U.S. 308 (1977). The state's interest in preserving the integrity of its judiciary is not enough. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). Craig v. Harney, 331 U.S. 367 (1947). The state's interest in protecting a criminal defendant's Sixth Amendment right to a fair trial is not enough. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). The state's interest in preserving the anonymity of victims of

sexual assault is not enough. Florida Star v. B. J. F., 491 U.S. _____, 109 S. Ct. 2603, 105 L.Ed.2d 443 (1989), Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). The state's interest in preserving the integrity of public office is not enough. Near v. Minnesota, 283 U.S. 687 (1931), cited in Worrell Newspapers of Indiana, Inc. v. Westhafer, 739 F.2d 1219, 1233 n. 4 (7th Cir. 1984), aff'd, 469 U.S. 1200 (1985). Not even national security is enough. New York Times Co. v. United States, 403 U.S. 713 (1971). Then, surely the state's interest in achieving settlements -- at the cost of the free speech of an officer of the court -- is not enough. This is particularly true where, as here, the object of the gag order is to suppress evidence of other lawyers' admitted, major misappropriations of client funds.

Use of inherent contempt powers, to dispossess an attorney of his file and to totally gag him, does not serve judicial

economy, especially by achieving settlements at the cost of the First Amendment. The long, costly and convoluted post-trial history of the Seward v. Sterns case is the best proof refuting the sham appeal to "judicial economy" as a justification for the sweeping secrecy the trial court endorsed.

Mr. Damer is not only silenced as an individual by these orders; he is rendered ineffective as an attorney. As an attorney, he may initiate public investigations of the misappropriations he claims to have found concerning another attorney's charging of clients with non-existent investigation, meals, and other costs. But all such investigation will be stifled -- and affected clients will be permanently prejudiced -- if the state is to be allowed to subject Damer to a contempt conviction and to restrict or totally defeat Mr. Damer's access to the relevant evidence he gathered.

Damer's actions are protected in another context. Withholding files in the face of contempt orders is symbolic expression protected by the First Amendment, even though it is conduct, not words. Tinker v. Des Moines School District, 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed.2d 731 (1969) (wearing black armbands to school in protest against the war in Viet Nam; the lower court's upholding of disciplinary action was reversed by this Court). Prior restraints and penal sanctions on speech are presumed unconstitutional. They are upheld only in extraordinary situations. The situation which faced the Superior Court of San Francisco was not grave, and did not justify holding Mr. Damer in contempt. [5]

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[5] Indeed, as the Court of Appeal observed in Mary R., supra, the trial court was at liberty to honor the lawful aspects of the settlement and to decline to enforce any of the terms of "secrecy".

Ironically, in Mr. Damer's public filing, in the Contra Costa Superior Court action, the judge in that case refused to accept the materials unless they were not filed under seal. The same facts obtained on Damer's appeal in California courts; the Court of Appeal and California Supreme Court were repeatedly notified of the lower court's "sealing" and "gag" orders, but declined to seal Mr. Damer's petitions.

A court may hold a newspaper in contempt only when that media acts as a clear and present danger to judicial operations. "For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." Bridges v. California, 314 U.S. 252, 263, 62 S.Ct. 190, 86 L. Ed. 192 (1941).

Mr. Damer was, in essence, found in contempt for having caused the publication of proceedings of a court, just as a grand jury witness might be accused of doing. But in Butterworth v. Smith, 58 U.S. Law Week 4363 (March 21, 1990), a situation occurred that was analogous to that of Mr. Damer when he was ordered to give up his file. Mr. Damer had gathered all of the evidence himself; he did not learn anything relevant and new in the courtroom that he hoped to divulge (indeed, he tried to withdraw as counsel as soon as the strange secrecy stipulations were placed on the record.) Similarly, in Butterworth, a grand jury witness sought to publish various material which he had independently discovered. Butterworth indeed expressly distinguished a case cited below by the opposition in this Seward/Sterns case, namely, Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984):

"by contrast, we deal [here, in Butterworth], only with respondent's right to divulge information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of his participation in the proceedings of the grand jury. In such cases, where a person 'lawfully obtains truthful information about a matter of public significance,' we have held that 'state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.'" 58 U.S. Law Week 4363, 4365.

Accommodating Real Parties' desire -- i.e., to suppress any revelation of their own stark memos admitting to wrongdoing and to prevent their numerous clients from using those memos in another pending case -- hardly constitutes such a "state interest", much less one of the "highest order."

III. A TRIAL COURT'S DELIBERATE PRECLUSION OF ANY APPELLATE METHOD OF STAYING SUMMARY ORAL ORDERS OF TOTAL DISPOSSESSION, THE DENIAL OF ANY REVIEW OF THE VALIDITY OF THOSE ORDERS AT THE RESULTING SUBSEQUENT CONTEMPT HEARING, THE DENIAL OF A JURY TRIAL ON CHARGES OF CRIMINAL CONTEMPT, THE DENIAL OF CROSS-EXAMINATION OF ANY OF THE ACCUSERS AT THE CONTEMPT HEARING, AND THE DENIAL OF ANY MEANINGFUL, ESTABLISHED APPELLATE REMEDY FOR CHALLENGING THE CONTEMPT JUDGMENT, TOTALLY AND SYSTEMATICALLY VIOLATES AN ALLEGED CRIMINAL CONTEMNOR'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION

Appellate remedies were effectively denied at every stage in the proceedings:

As indicated above, the original "dispossession" order was designed to require compliance before any stay of supersedeas could be even sought, much less obtained. As of the beginning of the next court day after the order was issued, Damer would already be in contempt of court even before any hastily drafted application for a stay could be filed, much less considered by any court of appeal.

And at the other end of this vicious circle, there would be no right of appeal either. The California statutory scheme (Code of Civil Procedure §1222) specifically precludes any right of appeal from a contempt judgment, as noted in Bermudez v. Municipal Court, 279 Cal. Rptr. 690 (Second District, Division 2, 1991).

Petitioner submits that the Fifth and Fourteenth Amendments simply cannot be accorded with such a legislative scheme, especially where the result is to deprive a lawyer of his property (files) without giving him a meaningful appellate remedy.

Denial of jury trial:

Criminal contempt is a misdemeanor in certain circumstances, including those Mr. Damer was apparently prosecuted under, California Penal Code §166. The penalty in California for contempt is a maximum of one year in a detention facility, California Penal Code §19.2. Thus, it is not a petty crime for which no jury trial is needed. Rather, jury trial is required under the Sixth Amendment: "The question in this case is whether the possibility of a one-year sentence is enough in itself to require the opportunity for a jury trial. We hold that it is." Baldwin v. New

York, 309 U.S. 66, 69, 90 S. Ct. 1886, 26 L.Ed.2d 437 (1970) -- emphasis supplied. Surely, a California contempt conviction requires the opportunity for a jury.

Even the California Supreme Court has observed that a defendant in a criminal contempt proceeding is entitled to a jury trial; Mitchell v. Superior Court (1989) 49 C. 3d 1230, 265 Cal.Rptr. 144.

Denial of rights of cross-examination:

This Court observed in Coy v. Iowa, 487 U.S. 1012, 108 S. Ct. 2798, 101 L.Ed.2d 857 (1988) that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact," 487 U.S. 1012, 1016. It is true that the Confrontation Clause does not guarantee criminal defendants an "absolute right to a face-to-face meeting with witnesses against them at trial," Maryland v. Craig,

_____ U.S. _____, 110 S. Ct. 3157, 3163, 111 L.Ed.2d 666 (1990), but that same case restated the law "That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in Coy, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured," 110 S. Ct. 3157, 3166.

In the instant case, there is no important public policy to support the failure to allow Damer the confrontation of witnesses. Nor was the reliability, if any, of arguments of hostile lawyers at a contempt hearing, a reasonably certain or valid means of setting out the underlying facts on the record.

Mr. Damer has been convicted on three counts of contempt, without having been afforded the opportunity to cross-examine those who accused him. The law on this point is beyond rational dispute. See United States v. Vargas, 91 Daily Journal D.A.R. 6673 (Ninth Circuit, June 7, 1991; "In this case, the district court's procedure strait-jacketed the defense attorneys and left no room for them to ask the probing questions that can be prompted by the dynamics of spontaneous questioning. This was not the cross-examination that the sixth amendment guarantees." D.A.R. 6673, 6677, noting that the presence of accusers, at the hearing, precludes the utilization of those accusers' sworn or unsworn out-of-court statements as evidence against accuseds such as Damer unless such accused persons are allowed the right of cross-examination.)

Mr. Damer was never afforded a simply clear right to cross-examine witnesses in his criminal contempt hearing. His due process rights were therefore not honored.

Denial of meaningful appellate remedies:

In addition to other rights denied him, Damer was never afforded any meaningful right of appeal; indeed, he was adjudged to be in contempt on one count exactly because he "filed a petition for writ of mandate, together with exhibits, with the Court of Appeal for the State of California, First Appellate District, Division 4, without that petition being filed under seal." (Again, Damer had advised the Court of Appeal of the trial court's oral "sealing" and "gag" order, but the Court of Appeal declined to seal Damer's petition despite even Real Parties' letter requests for "sealing".)

Although this Court has never ruled that there is a constitutionally guaranteed right to appeal, this Court has never held that there is no Constitutional right to appeal, either, noting only in dicta, from time to time, that "There is, of course, no constitutional right to appeal"; Jones v. Barnes, 463 U.S. 745, _____, 103 S. Ct. 3308, 77 L.Ed.2d 987 (1983). Unlike the situation herein, in Jones as in all cases where such dicta appear, the State had afforded an appeal to the involved defendants; so the issue of the right to an appeal, after denial thereof, can be directly addressed, here and now, in terms of modern-day due process.

Ironically, the State of California has convicted Damer of contempt for his even having attempted an appellate remedy. [6]

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[6] Incidentally, a specific right to challenge deportations by appeal was found in United States v. Mendoza-Lopez, 481 U.S. 828, 107 S. Ct. 2148, 95 L.Ed.2d 772 (1987).

This surely is the time and the case to expand the reasoning of Lopez, infra: "Our cases establish that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative process," Id. at 837-38.

For due process to be served in Mr. Damer's case, only redress by this Court remains. The oral order made by the trial court could not be timely appealed before compliance therewith could be challenged in any way but disobedience; a different trial court judge, assigned to conduct a contempt hearing on that disobedience, declined, for judicial comity's sake, to entertain any challenges to the original order's validity; the Court of Appeal then declined to entertain a similar petition re the merits of the original order; and the Supreme Court did likewise.

It is absurd that if Damer had been charged with stealing the trial judge's pencil, Damer would have been entitled to all the due process defined by hundreds of years of jurisprudence, before he was convicted; and after he was sentenced, he would be assured the issuance of a written, detailed opinion, by the California Court of Appeal, on the merits of the "cause" inherent in such a conviction. (Please see the California Constitution, Article VI, §14, guaranteeing a right to a written opinion in any "cause" on appeal; a conviction of contempt is, amazingly, not such a item, even if the contempt is criminal and civil in nature.)

If Damer has not been denied due process by his state's judicial system, he surely has been denied the equal protection of California's laws, which assure mere civil litigants, quarrelling over a few thousand dollars, the right to a true and plenary appeal.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges that the writ of certiorari be granted.

Respectfully submitted,

Nicholas Damer
Counsellor at Law
LIBERTY COURT
30 Avenida Portola
P. O. Box 939
El Granada, CA 94018

Telephone (415) 726-5588
In Propria Persona

APPENDIX A

Filed Mar 28 1991
Robert Wandruff Clerk
Deputy

First Appellate District, Division Four, No. A051211
S019454

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

NICHOLAS DAMER, Petitioner

v.

SUPERIOR COURT COUNTY OF SAN FRANCISCO, Respondent

GERALD C. STERNS, Real Party In Interest

Petition for review DENIED.

Mosk, J. is of the opinion the petition should be granted.

LUCAS
Chief Justice

APPENDIX B
CALIFORNIA COURT OF APPEAL

FIRST APPELLATE DISTRICT

DIVISION FOUR

NICK DAMER
v.
SUPERIOR COURT, SAN FRANCISCO COUNTY
GERALD C. STERNS

FILED
Apr 11 1990
Court of Appeal - First App. District
By Ron D. Barrow
Deputy

AO49125
San Francisco County
Sup. Ct. No. 826241

BY THE COURT:

Petitioner not having been held in contempt, the petition is denied as premature.

Dated: Apr 11 1990

POCHE, ACTING P. J.

APPENDIX C
CONFIDENTIAL MEMORANDUM

TO: GCS [Gerald C. Sterns]

FROM: TCS [Thomas G. Smith]

RE: Office and Nairobi problems

DATE: September 1, 1982

For some time I have been trying to get together with you to discuss both the office problems and the Nairobi case. The problems are interrelated in my view.

I have been writing this memo since August 24th and am dictating it on September 1, therefore, the Nairobi problems to some extent no longer exist but I believe a discussion of them will reveal much of what I see is wrong with the office and the way it is managed.

I have worked with you and for you for more than 10-1/2 years as an attorney ....

I believe we are seeing a real crisis in the office for a number of reasons and if we do not resolve them and at the same time begin to manage the office I think we will be out of business before too long ....
This office is know [sic] as your office to the people we deal with. Your office has a reputation of not paying its bills.

I cannot make an agreement concerning money with anyone and expect it to be honored because we have no money management. Good experts who have served us well go unpaid. No explanation of why they are unpaid or when they will be paid is given to them.

Associated attorneys whom we rely on for daily support in our out-of-state cases go unpaid.

Cost-sharing arrangements with other attorneys go unhonored ...

Nairobi is an example of cases that suffered; countless dollars were wasted and not an insignificant amount stolen ....

Nairobi's money will be gone like yesterday's rain unless we ... establish some money policies and controls.

Adding a few hundred dollars of phony cases costs for ICI[7] is not going to cure the problem. It is tacky, unethical, and is causing concern among the lawyers. We would be in a hell of a fix if, for example, we get involved in litigation or arbitration over the fees in the Kelly Parks case with the Paden office, if they start to question why we have a $500 fee for ICI on the cost statement ....

Another thing that comes to mind.

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[7] "ICI" was Investigative Consultants International, Real Parties' "in-house" private investigation firm, and a tenant in Real Parties's owner-occupied building.

When John was in Seattle with us he left from Seattle and went to Boise. That ticket cost $129. He wanted to charge that ticket to the office rather than as a personal expense. The round trip fare from San Francisco to Seattle is $190. There is no reason why the Nairobi clients should pick up the cost of John's personal trip to Boise. If he had taken $120 from petty cash to spend on himself with no intention of repaying it you would have been outraged. Why should he be able to do the same thing in a round-about fashion? ....

I have stated the conditions in the office as I see them in very harsh terms in the hope that it will grab your attention and make you realize that we really need to do something and do it soon.

APPENDIX D

Robert L. Denebeim
Attorney at Law

900 Veterans Blvd. Suite 510
Redwood City, California 94063
415 361 8034

February 2, 1990

Nicholas Damer, Esq.
Liberty Court
P. O. Box 939
30 Avenue Portola
El Granada, California 94018

Dear Nick:

I am writing to confirm yesterday's telephone conversations. You requested, and

I agreed, to become attorney of record in the Seward case. I will be your associate counsel and assist you in the trial of this case. We agreed that I will work for a fixed fee of $15,000.00, which is due immediately. You understand that I have not had a chance to study this case and that the best I can do is to assist you in a secondary capacity and under your instruction, in the presentation of the case at trial. It is contemplated that my services will be limited to assisting you in the trial of this case but that the scope of my services will not include any post-trial or appellate matters. In our conversations you indicated that your fee agreement with Ms. Seward provided that you had authority to employ associate counsel at your expense. I understand that the expense for my services is being undertaken by you personally, and not by Ms. Seward directly to me.

Also confirming Thursday evening's telephone conversations, I called Maria Seward and spoke with her on the telephone. She consented to my employment. I indicated to her the amount of the fee as well as my own lack of familiarity with the file. She indicated her understanding and consent to my association with you in the case. I look forward to working with you on this matter and to contributing my best efforts to a successful result.

Very truly yours,

Marie Dillon for
Robert L. Denebeim
Attorney at Law
RLD:md

APPENDIX E

(Extracted from Petition to California Supreme Court)

I. INTRODUCTION AND STATEMENT OF ISSUES PRESENTED

Respondent Court found Petitioner guilty of both criminal and civil contempt for failures to obey orders granted as part of a secret settlement to which Petitioner vigorously objected ...

Real Parties obtained the orders to impede revelation of apparent violations of the laws regulating their conduct as attorneys, and to prevent potential assertion of damage claims by thousands of Real Parties' previous clients. In this extensively publicized case, closely followed in the legal media, the Supreme Court's ruling on this Petition will signal the final judicial stamp

of approval or disapproval on this and similar "confidential settlements."

The following issues are presented as a result of the involved proceedings.

1. Can a trial court, over an attorney's objection and in spite of his or her Fourth Amendment rights, enforce a "secret settlement" by ordering the total surrender and the ultimate destruction of that attorney's file and all copies of any papers ever placed therein (such as work product, records of investigations, notes on informants' statements, and other confidential material and potentially relevant evidence) in a situation where his or her adversaries may wield the reluctantly revealed contents against both lawyer and client or assert the alleged absence of evidence as grounds for an abuse of process or malicious prosecution suit against the dispossessed lawyer?

2. Can a trial court, after termination of a highly publicized trial, lawfully restrict an attorney's First Amendment rights and his or her ability to "discuss" that court's actions or the case, and, to further accommodate the defendant lawyers and the co-defendant malpractice insurer, implement a "secret settlement" in a way which impairs appellate relief, impounds vital evidence, and impedes others' remedies for defendants' misconduct?

...

4. Can a trial court hold a lawyer in contempt for actions allegedly taken in violation of a written order that does not exist, or in violation of purported oral orders, when that court fails to make a timely written order or provide a timely transcript, and when the ultimate written order issued, after the alleged contempt, is materially inconsistent with the transcript?

5. Can a trial court deny a jury trial to a person accused of criminal contempt, simply because, in the middle of the hearing conducted without any jury, the moving parties pretend to be abandoning criminal sanctions, when the [judgment obtained was for "criminal" contempt and the] same parties were seeking over $150,000.00 of fines, which, if left unpaid, would be likely to ultimately result in imprisonment ...

6. Can a court of appeal, after a conviction of criminal contempt, constitutionally reject the attempt to reverse that conviction by way of a summary denial ordered without ... a written opinion?

California law allows no direct appeal from the contempt conviction. The only available appellate remedy was a petition for writ of certiorari. That avenue of relief was exhausted on January 25, 1991 when the Court of Appeal summarily denied the

petition without comment [Appendix B.] The judgment of criminal conduct was thus left intact even though at the contempt hearing before Respondent Court, Real Parties purported to be seeking only civil, conditional monetary penalties, in order to avoid any chance of having the jury trial duly demanded there by Petitioner (R.T., August 10, 1990 hearing, pp. 43-45, and p. 87, lines 14-18, by the Judge.)

The same transcript noted Petitioner's rejection of a critical element of the "secrecy" program Real Parties affirmed in the contempt prosecution they initiated. Asserting attorneys' rights expressly recognized in B P Alaska v. Sup. Ct. (1988) 199 Cal.App.3d 1240, 1252-61, 245 Cal.Rptr. 682, Petitioner has declined to obey orders to give up his file ... Real Parties still defended the orders compelling dispossession, issued at Real Parties' requests, claiming these

directives were the appropriate judicial recognition of Real Parties' "right to pay money in exchange for ... confidentiality and in exchange for the purchase of [Petitioner's] file" ... To prevent the Sun Valley Mall plaintiffs from using the evidence gathered by Petitioner, not only were he and the jurors subject to "gag" orders, but also, Petitioner's attorney was likewise restrained as soon as she appeared at the March 8 hearing (R.T., pp. 162-3.) Petitioner tried to present, to the Contra Costa Superior Court, papers from his file, including the "phony case costs" memo, noting these items might be reviewed "under seal" in deference to Respondent Court's orders. The Contra Costa Superior Court, however, rejected Petitioner's submittal, writing that such "private" communications would not be read and that all papers must be served on all parties involved in the Sun Valley Mall case.

By the time that Petitioner fully complied with these requirements, the Contra Costa Superior Court had already finally ruled on the challenges to Real Parties' expense demands, limiting disallowed claims to @$125,000.00. ...

So even though Respondent Court did not issue a written order until April 4, 1990, Petitioner was found guilty of violating a non-existent March 9 order by virtue of conduct occurring between March 12 and April 2, 1990. ...

II. PROPRIETY AND NECESSITY OF SUPREME COURT REVIEW

.... B. This Petition Presents An Appropriate Opportunity For This Court To Exercise Its Discretion And Review Not Only Petitioner's Constitutional Claims But Also All Challenges Of The Disputed Orders and Procedures

This Supreme Court should exercise its discretion to rule upon the federal constitutional claims Petitioner duly and timely raised in the trial court and in the Court of Appeal ...

And if Petitioner is to be afforded the due process of law and equal protection guaranteed by the Constitution of the State of California and the Constitution of the United States of America, then this Supreme Court, by itself or through a subordinate court, must assure that Petitioner is given a meaningful appellate remedy, regarding his criminal conviction, so as to address the merits of the challenges to the actions taken against his rights. The record shows that no judicial officer or body has ever ruled, by way of an explanatory decision, on any of the various challenges to the purported March 9, 1990 orders and the related contempt proceedings, whether those

objections be founded on constitutional or other grounds. ....

The rationale behind the state constitutional provision (Article VI, §14) -- requiring a written opinion in the appellate resolution of any "cause" -- is surely the idea that an explanatory decision is not only a right appropriate to an appellant, but also a necessary safeguard against the abusive, collusive, irrational or arbitrary exercise of judicial authority, to the detriment of both the aggrieved private party and the public welfare. .....But as matters now stand, Petitioner has no true assurance of ever having received a fair hearing, no way of knowing why he lost at this latest stage of this complex dispute, and no chance of correcting any prejudicial misconceptions. To paraphrase their official responses to Petitioner's pleas, Judge Hatch said to Petitioner, "I can't consider your challenges"; and then the

Court of Appeal appears to have merely added "We won't." Petitioner would have received more procedural safeguards if he had committed a common criminal act like burglary; then he would at least have received a jury trial and an appeal that could only be decided with a written opinion.

....

III. FURTHER ARGUMENT IN SUPPORT OF PETITION

...

Nor, in this nation, are First Amendment rights denied to those persons who are summarily branded with the descriptions given Petitioner. This leads to the next discussion.

B. A Trial Court Cannot Impose a Post-Trial "Gag" Order On Counsel Who Participated In A Highly Controversial And Public Trial Simply Because The Defendants, One Of Whom Is A Self-Publicized Public Figure,

Paid A Large Sum For A "Secret Settlement", Especially Where The "Gag" Order Has The Effect Of Suppressing Evidence Relevant To Another Pending Proceeding And The Effect Of Impeding Expeditious Remedies Necessary To Protect The "Gagged" Attorney's Constitutional And Property Interests

....

At that point in time, the trial court no longer had any constitutional power to "gag" the witnesses to the events of the trial, such as counsel and jurors. At R.T. March 8, p. 148, l. 19 to p. 149, l. 6, the judge admitted this but based any continuing "gag" order on the "stipulation" for silence.

It was later made clear that Real Parties Sterns were attempting to use a "stipulated" gag order (i.e., pursuant to a stipulation in which Petitioner did not participate) to suppress the revelation of the Smith memo

and other damaging information which might adversely affect the Sterns' posture in the Sun Valley Mall case. Again, as soon as Petitioner's hastily retained attorney, Cynthia Frazier, appeared in court on March 8, 1990, Real Parties Sterns' attorney and his new ally, Petitioner's former co-counsel, tried to have Ms. Frazier recused and silenced (R.T. 162-3; R.T. 180, l. 15-27; R.T. 186,. l. 26 to R.T. 187, l. 19; R.T. p. 203, l. 17-28.) Recusal did not occur; however, she was ordered not to disclose any information she might learn or obtain by virtue of her participation in the Seward v. Sterns hearings -- and the suppressive intent of this directive cannot reasonably be doubted.

No great elaboration is necessary to demonstrate that the trial judge was abusing his power in attempting to suppress evidence clearly relevant to the pending Sun Valley Mall dispute over Real Parties Sterns'

practices of assessing clients with "phony cases costs".

Both Ms. Frazier and Petitioner were barred from "disseminating the information" (e.g., about Sterns' "phony case cost" practices) or be faced with "criminal -- quasi-criminal penalties" (R.T. March 8, p. 226, lines 3-8). The alleged ban, per the Order To Show Cause, prohibiting "discussing" the case, is explained by the absolute restriction on any "disseminating". No reasonable person could classify this as anything other than a totally unconstitutional prior restraint on Petitioner's First Amendment rights. And no fair person would feel anything but outrage about the order that prohibited revelation of this information to the Sterns' affected clients.

Petitioner had a reasonable basis for sharing information with the Contra Costa Superior Court.

First, Petitioner had a citizen's right to inform Judge Patsey of the facts. Second, Petitioner's fee interests were being threatened since Real Parties had disclosed intentions to cooperate with each other in a way that would prevent collection of Petitioner's fee. On March 16, 1990, Petitioner forwarded the letter to Judge Patsey found at the aforementioned Exhibit H, page 1. The letter began:

> "I write this letter as a potential lienholder in the above-entitled action, as a friend of your court, as a citizen of our great state and nation, and as one who wishes to avoid the perpetration of a fraud, both to your personal prejudice as a well-respected judge, and at the ultimate financial expense of the long-suffering plaintiffs in the [Sun Valley] ... proceeding."

One week later, Petitioner initiated the filing of the motion for lien for his fees, in the manner stated in writing by Judge Patsey on March 22; namely, with due service on all parties to the Sun Valley case, after allowing Real Parties, prior to said service, ample opportunity to persuade Judge Patsey to refuse to accept anything except under seal and to excuse the need for service. For these actions, Petitioner was adjudged guilty of contempt; and although for each service -- of the moving and the reply papers on each of the involved 70 +/- parties -- $1,000.00 of fines and five days of jail were sought to be imposed, only one $1,000.00 penalty resulted.

Petitioner's third contempt was found to consist of the revelation of the "secrecy" scheme by "discussing" it with the Court of Appeal, when he sought to block the impending impounding of his file, through

the first set of contempt proceedings, by filing a Petition for Writ, in late March, 1990, "without that Petition being under seal." The parties who successfully sought contempt a second time, in August of 1990, failed to ever show how such a petition could ever have been filed, whether under seal or not, without violating the "gag" order forbidding "discussing" the Seward case.

It is axiomatic that a United States citizen has a right to petition for a redress of grievances and that such measures include petitioning courts and "discussing" the problem that generated the need for the relief sought. ... Yet the Petitioner was held in contempt for exercising basic legal rights.

...C. A Trial Court May Not Impose Contempt For Violation Of Written Orders Admitted To Be Nonexistent By The Moving Parties, Nor Deny A Jury Trial When, At The

Inception Of The Contempt Hearing, Fines Of Approximately $150,000.00 and Imprisonment In Excess Of One Year Are Being Sought, And The Proceedings Are Ultimately Used, As Originally Intended, To Generate A "Conviction" Of "Criminal" Contempt

Judge Hatch found Petitioner guilty of "counts" of contempt which integrally included allegations of the violation of a written March 9, 1990 order, even though the moving parties admitted that no such order existed.

This result simply cannot constitute the application of due process of law, especially where the written order ultimately issued, after the alleged acts of contempt, was materially inconsistent with the transcript of the oral proceedings undertaken before those alleged acts. (Details of critical discrepancies were noted at page 25 of the Petition in AO51211 and in the oral and written

oppositions submitted with respect to the August 10, 1990 contempt and sanctions hearing.)

Nor may a jury trial be denied when penalties of such magnitude are being pursued at the outset of the proceedings. Even after the moving parties purported to be withdrawing all demands for the imprisonment of Petitioner and pretended to no longer be seeking "criminal" contempt, the monetary penalties being sought were still of such a magnitude that the denial of a jury trial is inconsistent with constitutional safeguards. See, e.g., the Ninth Circuit's opinion in U.S. v. Hamdan (1977) 552 F2d 276, as noted in Mitchell v. Sup. Ct. (1989) 49 Cal.3d 1230, 265 Cal.Rptr. 144. Clearly, Petitioner's "misdeeds" were misdemeanors; see Penal Code §§166 and 689.

D. The Court Of Appeal's Summary Denial, Of The Attempt To Overturn A Conviction

Of Criminal Contempt, Violates Petitioner's Rights, Under The Equal Protection And Due Process Clauses Of The State And Federal Constitutions, To The Issuance Of A Written Opinion In A "Cause" On Appeal, Particularly Where Constitutional Objections Are Raised .....

As mentioned previously, not a single court has indicated that it has conducted any review of the merits of Petitioner's various challenges to the contempt proceedings. In particular, Petitioner's constitutional claims were never addressed. The ultimate result is that the original trial judge's orders appear to have escaped any independent consideration by any other judge....

Nicholas Damer,

Petitioner In Propria Persona

PROOF OF SERVICE BY MAIL

I, Deborah Michelle Sanders, declare:

That I am employed in the County of San Mateo, California. I am over the age of eighteen years and not a party to the within action; my business address is: Post Office Box 939, Liberty Court, 30 Avenue Portola, Third Floor, El Granada, California 94018. On the date set forth below, I served, by first class mail with postage prepaid, the PETITION FOR WRIT OF CERTIORARI, on each of the interested parties, and did so in the following manner. Except as noted below, I enclosed three true copies of said PETITION in each of nine envelopes, separately addressed as follows:

Robert F. Wandruff, Clerk
California Supreme Court
South Tower, 8th Floor
303 Second Street
San Francisco, CA 94107
(415) 396-9400

Channing Hoo, Clerk
Court of Appeal
303 Second Street, Suite 600
San Francisco, CA 94107
(415) 557-1957

The Hon. Leighton Hatch
1800 8th Avenue
Sacramento, CA 95818
(916) 443-4010

The Hon. Alfred Chiantelli
Superior Court
San Francisco County
Dept. 7, City Hall, Room 417
400 Van Ness Avenue
San Francisco, CA 94102
(415) 554-5008

Robert C. Gebhardt, Esq.
Bronson, Bronson & McKinnon
505 Montgomery Street
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(415) 986-4200
For Real Party Elstead

William H. Simmons, Esq.
Patrick Rankin, Esq.
Rankin, Sproat & Pollock
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For Real Parties Lawyer's Mutual and Weil Adjusters

Glenn Allen, Esq.
Caron Stapleton Robb, Esq.
Craig Spencer, Esq.
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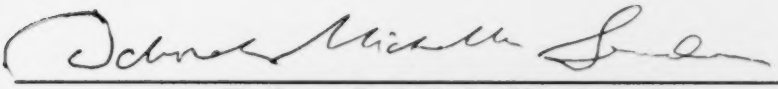
Lance Stryker, Esq.
35 Live Oak Road
Berkeley, CA 94705
(415) 548-5882

(The envelopes addressed to Channing Hoo, Clerk of the Court of Appeal, to the Honorable Alfred G. Chiantelli, to the Honorable Leighton Hatch, and to Lance Stryker of Damer & Stryker, contained only a single courtesy copy, since said persons are not truly parties to this proceeding.)

I prepared said envelopes to be delivered by certified mail, with return receipt requested. I sealed said envelopes with first-class postage and certified mail charges affixed thereon and on June 24, 1991, I personally deposited, in the El Granada office of the United States Postal Service at 20 Avenida Portola, all of said envelopes.

I further sent and deposited, on the same date and at the same office of the United States Postal Service, the original and the required copies of said PETITION FOR

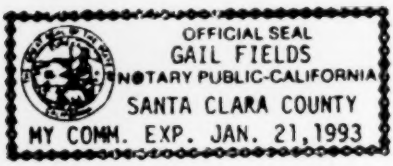
WRIT OF CERTIORARI to the Clerk of the United States Supreme Court, at 1 First Street, N. E., Washington, D. C. 20543, and sent said original and copies by way of first class express mail, with all necessary postage prepaid.



Deborah Michelle Sanders

SUBSCRIBED and SWORN to before me, the undersigned, a Notary Public in and for the State of California, and done on this 24th day of June, 1991:

WITNESS my hand and official seal.



Signature:

Gail Fields

Gail Fields

(2)

No. 90-1963

Supreme Court, U.S.
FILED
JUL 24 1991
OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

NICHOLAS DAMER,
Petitioner,

v.

SUPERIOR COURT IN AND FOR
THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent,

JOHN C. ELSTEAD, GERALD C. STERNS,
LAW OFFICES OF GERALD C. STERNS,
ELIZABETH WALKER,
LAWYERS MUTUAL INSURANCE COMPANY,
WEIL ADJUSTERS & CONSULTANTS, INC.,
GERSON MEHLMAN, and ROBERT L. DENEBEIM,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF IN OPPOSITION

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Counsel for John C. Elstead, Respondent

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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QUESTIONS PRESENTED

1. Where a state trial court approves a settlement agreement and orders compliance with its confidentiality provisions and determines that extraordinary circumstances require sealing certain documents, can it impose fines totalling $3,000 for contempt against one of the parties' former attorneys when he violates the order willfully and against his former client's wishes?

2. In a state court contempt proceeding, is there a right to a jury trial and cross-examination of "accusers" when the parties and the court make it clear they are considering only monetary penalties rather than imprisonment, and the fine imposed is $3,000?

LIST OF PARTIES

The only known parties to the current proceeding are those noted on the caption of the petition.

The underlying case out of which the contempt judgment arose included these additional parties:

Plaintiff: MARIA SEWARD SARGENT

Defendants: TAD SHAPIRO
JEANETTE SHIPMAN
WALTER WALKER III

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On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF IN OPPOSITION

Respondent John C. Elstead respectfully requests that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

Petitioner has filed four notices of appeal and five writ petitions in the California appellate courts, all in the single underlying case. According to his briefs filed in the California courts, petitioner

has also initiated several state bar actions. Two appeals remain pending in the California Court of Appeal. None of petitioner's other appeals or petitions has succeeded.

None of the state court appellate proceedings has generated an opinion.

JURISDICTION

Petitioner seeks review under 28 U.S.C. section 1257; however, the Court lacks jurisdiction. No substantial federal question has been properly raised and necessarily decided in the state court proceedings.

STATUTES INVOLVED

Petitioner specifies several provisions of the Constitution. None of these were timely raised in the state court.

STATEMENT OF THE CASE

1. Facts

Petitioner Nicholas Damer is an attorney. Plaintiff Maria Seward, while represented by petitioner, commenced in the Superior Court for San Francisco County the underlying legal malpractice action against attorney John C. Elstead, Gerald Sterns, Law Offices of Gerald Sterns, and attorneys employed in the Sterns office (Walter Walker III, Elizabeth Walker, Tad Shapiro, and Jeanette Shipman); the attorneys' liability insurer (Lawyers Mutual Insurance Company); and the insurance adjusting firm (Weil Adjusters and Consultants, Inc.).

Shortly before trial, petitioner associated attorneys Gerson Mehlman and Robert L. Denebeim as counsel for plaintiff. While plaintiff's case was being presented at trial, the parties participated in a judicially supervised settlement conference. During that conference, which took place over a three-day period from March 7 through March 9, 1990, the parties reached a settlement agreement.

The settlement agreement provided that the terms of the settlement would be confidential, the court file would be temporarily sealed subject to continuing judicial review, and the files of plaintiff's attorney, petitioner Damer, would be deposited with a receiver.[1] The court found good cause for temporarily sealing the file, and approved the terms of the settlement agreement. The court explained that it was protecting the records so that they would remain available to the parties, the attorneys, and any investigating governmental agency. (The sealing order was later modified to provide that only certain specified documents would remain sealed.)

In implementing the parties' settlement the court was simply administering justice and regulating the proceedings before it. The court specifically stated that there was no restraint on petitioner's, or any person's, ability to report unethical conduct to any governmental agency.

Petitioner objected to the terms of the settlement and stated his intention not to comply. During the hearing on March 9, 1990, the court ordered petitioner to comply with plaintiff's wishes and the terms of her agreement with defendants. Petitioner had withdrawn as counsel for plaintiff. Plaintiff continued to be represented by Messrs. Denebeim and Mehlman.

Petitioner violated the order in several ways. For instance, he distributed sealed and confidential information to over sixty attorneys involved in a separate unrelated case in which petitioner was uninvolved and represented no party;[2] he attached sealed and confidential documents as exhibits to a writ petition that he filed without a sealing request in the California Court of Appeal; and

---

[1]The evidence supporting the application for contempt included a letter from plaintiff's counsel, Mr. Denebeim, to petitioner explaining the importance of the settlement's provisions to *plaintiff*, petitioner's former client, and informing petitioner that *plaintiff* insisted on the confidentiality provisions. Petitioner's suggestion to the contrary, that his client did not desire the terms of the settlement agreement, is incorrect.

[2]Petitioner explains this distribution was to notify the parties in that unrelated case of petitioner's opinion regarding their attorney's misconduct. (Petition, p. 27)

he failed to relinquish the files as ordered. After an order to show cause and a hearing, petitioner was found in contempt of court based on those three violations. He was not found in contempt for violating a "gag" order by talking to the press. The court and the moving parties made it clear that imprisonment was not being considered as a punishment or sanction. On August 29, 1990, a judgment of contempt, fining petitioner in the amount of $3,000 ($1,000 for each violation), was entered. Petitioner was not imprisoned, and the judgment did not impose such punishment.[3]

Petitioner petitioned the California Court of Appeal for a writ of certiorari reviewing that judgment. That petition was summarily denied on January 24, 1991. Petitioner then petitioned the California Supreme Court for review. That petition was denied on March 28, 1991. Both appellate courts' denials were summary and unpublished.

Petitioner's inclusion of the California Supreme Court's order denying review, rather than the contempt judgment itself, suggests that petitioner seeks review of the California Supreme Court's order. However, the California Supreme Court has entered no judgment, and its declination to review the case is not a reviewable judgment under Section 1257. Accordingly, respondent presumes that petitioner seeks review of the contempt judgment.

2. How Federal Question Was Presented

Even assuming that petitioner seeks review of the contempt judgment, there is no timely raised federal question. When petitioner filed a petition for writ of certiorari in the Court of Appeal, challenging the contempt judgment, petitioner did not seek reversal based on any federal statute, constitutional provision, or basis for reversal. (Exhibit A, Table of Authorities)

---

[3]Petitioner's intimation that he was, or may be, imprisoned is irrelevant. The possibility that a future order may impose such punishment is speculative, premature and irrelevant to review of the existing judgment. Further, the very brief period of custody to which petitioner alludes (Petition, p. 5) was long before the entry of the contempt judgment that is the subject of the petition.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner addresses the purported merits of the case, but does not specify any reasons for this Court's discretionary issuance of a writ of certiorari. This case certainly does not satisfy the standards established in Supreme Court Rule 10, and such a writ should be denied. This Court lacks jurisdiction, the judgment is correct, there is no substantial federal question, the matter concerns findings of fact and does not concern an important question which is the subject of any conflict of decisions.

1. The Supreme Court Lacks Jurisdiction

In challenging the contempt judgment, petitioner raised for the first time the federal constitutional provisions he now relies on in his petition for review in the California Supreme Court. He did not raise any of them in the Court of Appeal. (Exhibit A)[4]

The only apparent reference to the United States Constitution in petitioner's brief in the state court of appeal is this single sentence: "The federal Constitution, and related provisions of the California Constitution and the California Penal Code, *guaranteed* Petitioner a jury trial, *even if* the only criminal penalty were a fine, since the criminal charges were *misdemeanors* (see [Calif.] Penal Code §§ 166 and 689.)" (Emphasis in original.) This single reference, in the middle of a brief wholly devoted to state law issues, does not suffice. In *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 549-50 (1987), this Court ruled that it would not review an issue that was first presented in the court of appeal petition for rehearing, despite an allusion to that issue in the original court of appeal brief:

> Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal. The court denied the petition without opinion. When " ' "the highest state court has failed to pass

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[4]Attached is the Table of Authorities from petitioner's petition for a writ in the California Court of Appeal. It lists the numerous California rules and statutes upon which petitioner relied. It does not include any federal provision.

> upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." ' "

Similarly, in this case petitioner did not sufficiently inform the California Court of Appeal that it had been presented with a claim subject to this Court's jurisdiction until petitioner filed his brief in the California Supreme Court.

2. The Judgment Is Correct and Does Not Violate the Constitution

The contempt judgment is valid and proper. The trial court had jurisdiction to enter the orders, and, after a hearing, determined that petitioner had willfully violated them despite knowledge and ability to comply.

Further, the hearing did not deprive petitioner of any rights under the Constitution. He was not denied access to the court of appeal, as evidenced by his numerous appeals and petitions there. In addition, the Constitution does not guarantee a jury trial in a contempt hearing that results in imposition of a $3,000 fine and no imprisonment. *Muniz v. Hoffman*, 422 U.S. 454, 475-77 (1975) (right to jury trial does not apply to contempt proceeding resulting in $10,000 fine unaccompanied by imprisonment). Finally, any supposed right to confrontation is irrelevant here. Petitioner submitted a lengthy brief in opposition to the order to show cause, and appeared at the hearing represented by counsel. Both petitioner and his attorney argued extensively. At no point — either in his brief or at the hearing — did petitioner argue that he was somehow being deprived of a right to "cross-examine" his "accusers."

3. The Petition Does Not Concern An Important Question That Is the Subject of a Conflict of Decisions

Petitioner was one of three co-counsel representing the plaintiff in the underlying case. Petitioner's client wished to settle the case and keep the matter confidential. The court approved the agreement and ordered petitioner to comply with the agreement his

client had entered. Petitioner willfully refused to do so, and the court adjudged him in contempt. There is absolutely no conflict of decisions or important question presented in this case whatsoever.

Moreover, the decision here — concerning a case where *all* of the involved parties desire a confidential settlement agreement — concerns only these parties. It is not a decision that will affect any other litigants. This case does not warrant issuance of a discretionary writ under Rule 10.

4. The Petition Concerns a Finding of Fact

This case concerns a state trial court's factual finding that petitioner willfully violated the court's order sealing certain records and approving the confidentiality provisions of a settlement agreement desired and entered by all of the involved parties, including petitioner's former client. Petitioner, however, despite his client's wishes and best interests, insisted on violating the order and widely distributing information within the sealing and confidentiality order. After thoroughly reviewing the matter, the superior court concluded that petitioner had notice of the order, had the ability to comply with it, and that he violated it willfully.[5] The evidence certainly justified the legal conclusion drawn by the state trial court.

5. The Judgment Is Supported by an Independent and Adequate State Ground

The contempt judgment is supported by an independent and adequate state ground. The judgment states that it is based on petitioner's three violations of the provisions of a court order: his refusal to comply with the requirement that he turn over to an independent receiver the file generated in an underlying case, his violation of the confidentiality provisions of his own client's settlement agreement by filing confidential documents that had been sealed by the trial court, and his violation of the confidentiality provisions of his own client's settlement agreement and the

---

[5]Petitioner continues to exhibit a disregard for the court's order. By quoting sealed documents in his petition, he effectively circumvents the sealing order upon which the contempt judgment was in part based.

court's order sealing those documents by widely distributing those documents in a separate case. The court's order sealing the documents is a purely state law matter.

The sealing of the court file was ordered only after the parties' showing of extraordinary circumstances and good cause as required by California state law (*Champion v. Superior Court*, 201 Cal.App.3d 777 (1988)) and was determined to be necessary to the state court's administration of justice. In support of such a showing was the adamant request by petitioner's own client, the plaintiff in this matter, that the matter be sealed to prevent distribution of personal information detrimental to her. Petitioner's willful interference with that administration and with the court's respect and dignity, warranted the only punishment imposed, a fine of $3,000. The effectiveness of petitioner's interference is demonstrated by the fact that — because of petitioner's willful violation of the orders which his client supported — the settlement has not been achieved and the settlement funds have been interpleaded until resolution of petitioner's numerous appeals and arguments.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for John C. Elstead, Respondent

APPENDIX

Exhibit A Table of Authorities from petitioner's "Petition for Writ of Certiorari, Prohibition, or Other Appropriate Relief," filed in the California Court of Appeal

TABLE OF AUTHORITIES

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(3)

Supreme Court, U.S.
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WEIL ADJUSTERS & CONSULTANTS, INC.,
GERSON MEHLMAN, and ROBERT L. DENEBEIM,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether under California law and pursuant to the request of an attorney's client, a California state court may require the attorney to provide the client's files to an independent receiver?

2. Whether an attorney may be punished by civil or criminal contempt for violating a court order prohibiting the public dissemination of confidential information and documents?

3. Whether remedies were available to petitioner to contest the civil and criminal contempt judgments entered against petitioner for violating certain court orders?

LIST OF PARTIES

The only known parties to the current proceeding are those noted on the caption of the petition.

The underlying case out of which the contempt judgment arose included these additional parties:

Plaintiff:	MARIA SEWARD SARGENT
Defendants:	TAD SHAPIRO
	JEANETTE SHIPMAN
	WALTER WALKER III

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No. 90-1963

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

NICHOLAS DAMER,
Petitioner,

v.

SUPERIOR COURT IN AND FOR
THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent,

JOHN C. ELSTEAD, GERALD C. STERNS,
LAW OFFICES OF GERALD C. STERNS,
ELIZABETH W. WALKER,
LAWYERS MUTUAL INSURANCE COMPANY,
WEIL ADJUSTERS & CONSULTANTS, INC.,
GERSON MEHLMAN, and ROBERT L. DENEBEIM,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Gerald C. Sterns, Law Offices of Gerald C. Sterns and Elizabeth W. Walker (hereinafter "Respondents") respectfully request that this Court deny the petition for writ of certiorari filed herein by petitioner, Nicholas Damer. Denial of the instant petition is warranted for the following reasons:

1. No substantial, independent federal question has been raised by petitioner in this matter.

2. The questions addressed in this petition are issues concerning state matters and law and the contempt judgment entered against petitioner is supported by independent and adequate state grounds.

3. Any federal questions addressed in the petition were not raised in a timely manner in the courts below.

Additionally, pursuant to U.S. Supreme Court Rule 24.6 respondents hereby request that this Court strike the entire petition on the grounds that it contains "... burdensome, irrelevant, immaterial and scandalous matter." In Appendix C to his petition, petitioner has cited from a certain memorandum which has been ordered sealed by the California lower court. The document in question was never introduced as evidence in the proceedings below. The contents of the document have absolutely no relevance to the issues presented for this Court's consideration. Indeed, it contains obvious hearsay and appears to be nothing more than a draft, prepared by a former and now deceased partner of the respondents. Respondents respectfully submit that petitioner has included this document in the petition for the sole purpose of harassment and embarrassment and is part of his continuing attempt to pursue a personal vendetta against the respondents. Such action on the part of petitioner clearly exemplifies the very violations of the state court orders which resulted in petitioner being held in contempt.

I

PROCEEDINGS AND DISPOSITION BELOW

The instant petition arises from a civil and contempt judgment entered against petitioner as a result of his violation of certain court orders. After entry of the judgment, petitioner pursued a petition for writ of certiorari to the California Court of Appeals. No federal question was raised by petitioner at that time. The petition was denied without comment. Thereafter, petitioner filed a petition for writ of certiorari to the Supreme Court of the State of California. That petition was also denied without opinion.

Petitioner currently has pending two appeals before the California appellate court. One appeal arises from the order of the lower court, the violation of which led to petitioner's contempt judgment. The other appeal arises from the judgment itself.

II

JURISDICTION

Petitioner seeks review under 28 U.S.C. § 1257; however, the Court lacks jurisdiction. No substantial federal question has been properly raised and necessarily decided in the state court proceedings.

III

STATUTES INVOLVED

Petitioner specifies several provisions of the Constitution. None of these were timely raised in the state court.

IV

STATEMENT OF THE CASE

For the sake of brevity, respondents hereby adopt the factual statements set out by co-respondent John C. Elstead. Additionally, pursuant to U.S. Supreme Court Rule 15, respondents believe the following facts are relevant to this Court's determination of the instant petition.

The order of the lower court arose as a result of a three day judicially supervised settlement conference. The plaintiff (petitioner's client) and two of her attorneys, as well as the respondents and their counsel, agreed that the terms of the settlement were to be confidential. Furthermore, the parties and counsel, save for petitioner, agreed that all of plaintiff's files regarding the underlying case which were in the possession of the petitioner were to be delivered to an independent receiver, a retired Justice of the California Court of Appeals. The agreement was reached in order to effectuate the confidentiality of the settlement as well as to maintain the confidentiality of information obtained during the course of litigation.

During the settlement conference, the lower court considered the issue whether the plaintiff's files belonged to plaintiff or the petitioner. With regard to this issue, the court determined that under California law, the file belonged to the plaintiff. Addition-

ally, the court found that extraordinary circumstances and good cause existed to require the sealing of certain documents and the maintenance of confidentiality of certain information. This ruling was made pursuant to the guidelines set forth in the California case of *Champion v. Superior Court*, 201 Cal.App.3d 777 (1988). Petitioner was presented with ample opportunity to brief and argue these issues determined by the lower court.

Contrary to the allegation of petitioner, no "sale" of "his confidential, private case and investigation files" took place. As noted, the court determined that under state law, the files belonged to the plaintiff and entered an order designed to accomplish the agreement reached among the parties. Furthermore, no "suppression of evidence" occurred. Pursuant to the court's order, any person, including petitioner, would have access to the records and files by presenting a motion to the court. Notably, the court order gave any investigative agency, including the California State Bar, unfettered access to the documents. In this respect, the court order in this case is clearly distinguishable from the order found to be defective in the case cited by petitioner, *Mary R. v. B. & R. Corporation*, 149 Cal.App.3d 308 (1983).

Despite the court order, petitioner refused to turn over plaintiff's files to the receiver. Instead, under the pretext of seeking a lien for his attorneys fees, petitioner filed a motion in an unrelated case where respondent Sterns was the lead plaintiffs' counsel. Petitioner included in his papers, certain documents which the court had designated as being confidential and had ordered sealed. In addition to filing these documents with the court, petitioner disseminated them to approximately 60 other attorneys in the case. Additionally, petitioner filed a petition with the California appellate court and attached as exhibits documents which the lower court had ordered to be confidential. Petitioner undertook these actions without complying with the lower court's order that the documents be filed under seal and in complete disregard for the rules set out in *Champion*, 201 Cal.App.3d 777, governing the proper method for transmitting sealed documents to the appellate level. Petitioner persists in flaunting the order by attaching Appendix C to this petition which is one of the documents ordered sealed by the lower court.

V

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner has brought the instant petition pursuant to 28 U.S.C. § 1257, arguing that the actions of the lower courts deprived him of certain constitutional rights. However, in order to pursue this petition, petitioner must show that the federal questions were timely and properly raised in the courts below and served as the basis for the final judgment. Moreover, no jurisdiction for review exists if non-federal grounds are adequate to support the judgment reached by the state court.

In the instant matter, petitioner has failed to make the requisite showing. To the contrary, petitioner did not raise the federal constitutional provisions he now relies upon in a timely and proper manner. Furthermore, independent and adequate state grounds exist which support the judgment of contempt against petitioner. Thus, petitioner has failed to meet the burden necessary for a writ of certiorari.

1. Petitioner Did Not Raise the Federal Constitutional Issues in a Timely and Proper Manner

Petitioner has failed to meet the requirements of U.S.C. 28 § 1257. The Supreme Court will not decide federal constitutional issues which were not raised in a timely and proper manner in a state court in accordance with state practice. *See Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). When the highest state court has failed to pass upon a federal question, it is assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party before the Supreme Court can affirmatively show the contrary. *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 549-50 (1987).

Petitioner cannot meet this burden. As a matter of policy, on petition for review, the California Supreme Court normally will not consider any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal. California Rules of Court, rule 29(b)(1). Petitioner failed to raise any federal questions before the California Court of Appeal.

The only reference to the United States Constitution in petitioner's brief in the California Court of Appeal reads as follows: "The federal Constitution, and related provisions of the California Constitution and the California Penal Code, *guaranteed* Petitioner a jury trial, *even if* the only criminal penalty were a fine, since the criminal charges were *misdemeanors* (*see* [Calif.] Penal Code §§ 166 and 689." (Emphasis in original.) Absolutely no mention was made concerning First and Fourth Amendment rights.

Given the California Supreme Court's refusal to grant the writ sought by petitioner, it is unclear whether the denial was based on consideration and rejection of federal questions raised for the first time in petitioner's brief or whether it was based on his failure to raise the federal questions in a timely manner. As in *Board of Directors v. Rotary*, 481 U.S. 537, it must be assumed the omission was due to want of proper presentation.

2. Independent and Adequate State Grounds Exist to Support the Judgment

In his petition, petitioner raises essentially two questions with regard to the entry of the contempt judgment against him: 1) whether he has a constitutional right to protection of his "work product," and 2) whether he may be punished by civil or criminal contempt for violating a court order requiring certain information be kept confidential and under seal. With respect to each of these matters, sufficient and independent state grounds exist for supporting the judgment.

a. Work Product

In his application, petitioner cites no authority for the proposition that his "work product" is protected from disclosure by the federal constitution. Petitioner's citation to *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) only supports the proposition that work product is not discoverable by opposing counsel.

In the proceedings below, the California court necessarily determined, after full briefing and argument on all sides, that the client and not the attorney owns the file, including what has been

referred to as the attorney's "absolute work product" i.e. writings that reflect on attorney's impressions, conclusions, opinions, or legal research or theories. This determination is supported by ample California authority: *Academy of California Optometrists, Inc. v. Superior Court,* 51 Cal.App.3d 999, 1005-1006 (1975) (Attorney withdrawing from representation must deliver to the client all papers and property to which the client is entitled, including notes, papers, memoranda and communications.); *Weiss v. Marcus,* 51 Cal.App.3d 590, 599 (1975) (Work product belongs to the client.) California Rule of Professional Conduct 3-700 (D); California Code of Civil Procedure § 2018(f). Thus, under state law, the plaintiff as well as the lower court had the right to require petitioner to turn over his work product to the independent receiver.

b. Orders Regarding Confidentiality

Petitioner was also cited for violating the lower court's order prohibiting public disclosure of certain information and documents. In particular, petitioner violated the court's order by disseminating the document which he has included in the instant petition as Appendix C. Contrary to petitioner's assertion, he apparently obtained this document pursuant to a subpoena after contacting *ex parte* the wife of Thomas G. Smith, now deceased, who was a law partner of the respondents. Notably, Thomas G. Smith and his professional corporation were named defendants in the underlying lawsuit and were represented by counsel.

Clearly, the lower court had the authority to enter an order prohibiting the dissemination of this document, which petitioner obtained through court process, in order to protect the privacy rights and reputation interests of the respondents. With respect to pre-trial discovery and the use of court processes, this Court stated in *Seattle Times v. Rhinehart,* 467 U.S. 20 (1984):

> There is an opportunity, therefore, for litigants to obtain—incidentally or purposefully—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes . . . The prevention of the abuse that can attend the

> coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders. *Id.* at 35-36.

Given the propriety of the initial order, the court was likewise within its authority to hold the petitioner in contempt for violating the order. Thus, the contempt judgment entered against him was correct and proper.

Petitioner also deliberately and intentionally failed to follow the requirements set forth in *Champion v. Superior Court,* 201 Cal.App.3d 777 (1988) governing the proper procedure which litigants must follow in filing documents which are subject to a confidentiality order. According to the court in *Champion*:

> Where documents have been sealed by order of the lower court, over a petitioner's objection, the petitioner's obligation to present them to the appellate court does not change. *When pertinent to the writ petition, they should be presented separately, labeled as confidential, and accompanied by petitioner's objections.* Real Party in interest must then move for an order sealing the documents in the appellate court and shoulder the burden of proving the need for sealing. (Emphasis added) *Id.* at 789.

Thus, in this instance, petitioner was found in contempt for his disregard of the law and the specific order of the lower court.

3. The Contempt Proceedings Did Not Violate Petitioner's Constitutional Rights

Lastly, it is clear that petitioner was not deprived of his rights to due process and equal protection as a result of the entry of the contempt judgment. The Constitution does not guarantee a jury trial and right of cross-examination in a contempt hearing. *Merchants' Stock & Grain Co. v. Board of Trade,* 201 F. 20 (8th Cir. 1912) (Right to confrontation does not apply to contempt proceedings); *Muniz v. Hoffman,* 422 U.S. 454, 475-77 (1975) (Right to a jury trial does not apply to contempt proceeding resulting in $10,000 fine unaccompanied by imprisonment). Furthermore, petitioner has had, and continues to have, access to the

California Courts of Appeal, and he has exercised this right on numerous occasions. Therefore, no substantial federal question has been raised in this instance concerning the procedures followed by the lower court in holding petitioner guilty of contempt.

VI

CONCLUSION

For these reasons, respondents respectfully request that the petition for a writ of certiorari be denied. Respondents further request that the petition be stricken in light of petitioner's obvious disregard of the sealing order entered by the lower court.

Respectfully submitted,

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(4)

No. 90-1963

Supreme Court, U.S.
FILED
SEP 25 1991
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

NICHOLAS DAMER,
Petitioner,
v.

SUPERIOR COURT IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent,

GERALD C. STERNS; LAW OFFICES OF GERALD C. STERNS, A California Professional Corporation; JOHN C. ELSTEAD; ELIZABETH W. WALKER; WEIL ADJUSTERS AND CONSULTANTS, INC., A California Corporation; LAWYERS MUTUAL INSURANCE COMPANY, A Corporation; GERSON MEHLMAN; and ROBERT DENEBEIM,

Real Parties in Interest.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WERE THE FEDERAL QUESTIONS RAISED BEFORE THE CALIFORNIA COURTS IN A TIMELY MANNER?

II. DID INDEPENDENT AND ADEQUATE STATE GROUNDS SUPPORT THE JUDGMENT?

III. IS A JURY TRIAL GUARANTEED FOR AN INDIVIDUAL AT A CRIMINAL CONTEMPT PROCEEDING WHEREIN OVER $150,000.00 OF FINES ARE SOUGHT AGAINST THAT INDIVIDUAL?

IV. DID THE STATE PROCEEDINGS IN QUESTION DENY PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAW?

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FACTS

The facts were set forth in full in the Petition for Writ of Certiorari. Please note: Real Parties' Briefs in Opposition did not cite to the record or provide supporting appendices. The briefs made many inaccurate statements, some patently improbable (e.g., that Petitioner's original Appendix C, the Smith/Sterns "phony costs" memo, was a "draft"; that Petitioner was able to get such a memo <u>from a lawyer's widow</u> with ex parte process rather than with non-judicial investigative techniques; and that Petitioner's former client happily embraced Real Parties' secrecy demands.) Some claims are inherently nonsensical.[1] Other claims <u>misstate California law</u>; e.g., Rule 3-700D (modelled on ABA ethics) in fact <u>affirms</u> a lawyer's right to <u>keep</u> a copy of his files, as does California discovery and "work product" law.

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[1] For example, if it is true that "... there was no restraint on petitioner's ... ability to report [Real Parties'] unethical conduct to any governmental agency" (page 3 of Elstead's brief) <u>why was Petitioner punished for disclosing such conduct to other courts</u>?

ARGUMENT

I. ALL THE FEDERAL QUESTIONS WERE RAISED BEFORE ALL THE CALIFORNIA COURTS AND IN A TIMELY MANNER

The original Appendix E, appended to the Petition for Certiorari that Petitioner filed in this cause, speaks for itself in setting forth multiple constitutional arguments. Similar constitutional arguments were also made in other California proceedings in this cause, as expressed in Appendix F to this instant Reply Brief.[2] Real Parties' claims -- that federal questions were not brought up in the California courts -- are unsupported by the facts. Indeed, the record in California shows that each such federal constitutional question was raised at the earliest relevant opportunity, in the four cumulative petitions for relief, and preserved for later review.

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[2]This final appendix is designated as the next in order of Petitioner's appendices; the last appendix in the June 25, 1991 Petition was labelled Appendix E.

II. NO INDEPENDENT AND ADEQUATE STATE GROUNDS SUPPORT THE JUDGMENT.

There are no opinions; hence, it is impossible to say that independent and adequate state grounds -- indeed any state grounds -- support the judgment. The first petitions to the California Court of Appeal and California Supreme Court -- designed to arrest imminent contempt proceedings and to void the "gag" and "dispossession" orders -- were denied as premature. The second petition to the California Court of Appeal was also denied without comment, as was the second petition to the California Supreme Court (Justice Mosk voted to grant.) Each successive petition incorporated state and federal constitutional challenges raised in earlier petitions, but no appellate court ever addressed any of these arguments at all.

III. A JURY TRIAL IS GUARANTEED FOR AN INDIVIDUAL AT A CRIMINAL CONTEMPT PROCEEDING WHEREIN FINES OF OVER $150,000 ARE SOUGHT AGAINST THE INDIVIDUAL DEFENDANT

Arguing against the above proposition, Real Parties cite Muniz v. Hoffman, 422 U.S. 454 (1975), contending that case stands for this rule: "right to jury trial does not apply to contempt proceeding resulting in $10,000 fine unaccompanied by imprisonment" (page 6 of Elstead's brief, page 8 of Sterns'.)

The Muniz Court is better understood from reading the opinion at 422 U.S. 477:

" ... we cannot accept the proposition that a contempt must be considered a serious crime under all circumstances where the punishment is a fine of more that $500, unaccompanied by imprisonment ... it is not tenable to argue that the possibility of a $501 fine

would be considered a large risk to a large corporation or [the involved] labor union ... we cannot say that the fine of $10,000 imposed on Local 70 in this case was a deprivation of such magnitude that a jury should have been interposed to guard against bias or mistake. This union ... collects dues from some 13,000 persons; and although the fine is not insubstantial, it is not of such magnitude that the union was deprived of whatever right to a jury trial it might have under the Sixth Amendment."

The impact on the individual union members in Muniz (who were not personally ordered to pay any fine) was inconsequential -- less than $8 would need to be assessed against each member even if the union treasury were empty when the fine was due.

This is hardly the situation that confronted Petitioner; the record shows that over $150,000 of fines were sought from him,

and from him alone. But a reply to his many oral and written requests for an open, jury trial was deferred when Real Parties insisted on preventing any public trial; and then, in a retroactive effort to validate the completed non-jury, secret proceedings, the hearing judge, two weeks after the contempt trial ended, noted that since imprisonment -- as an immediate penalty -- was waived by the prosecuting Real Parties, no jury trial was necessary, and a mere $3,000 fine was implicitly constitutionally permissible.

Additionally, Real Parties have not met Petitioner's argument that the State of California denied him the equal protection of its own laws in refusing to grant him a jury trial, a right conferred by California statute, as set forth in Mitchell v. Superior Court (1989) 49 C.3d 1230, 265 Cal. Rptr. 144 (a case also acknowledging the trend, noted in Muniz, to extend the federal right also.)

IV. THE STATE PROCEEDINGS IN QUESTION DENIED PETITIONER DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS

At Page 8 of Real Party Sterns' brief, the author claims "petitioner has had, and continues to have, access to the California Courts of Appeal, and he has exercised this right on numerous occasions". This follows a quote from a California Court of Appeal case describing the procedure to be used in such Court, when dealing with the filing of documents previously sealed by a trial court.

What Real Party Sterns fails to note is that Petitioner was held in contempt not for openly filing sealed documents in the Court of Appeal, but for merely filing any petition at all in that Court, "without that petition being filed under seal" (see the contempt judgment, quoted at page 30 of the Petition.)

This conduct was a violation of the oral injunction of March 9, 1990 "directing [Petitioner Damer] to refrain from discussing this case or the settlement thereof with the press or with any other person ..." (see pages 26 and 27 of the Petition herein, quoting from the Order To Show Cause that led to the contempt hearing and judgment.)

The oral "gag" order, by its own very terms, forbade "discussing" the case, by spoken or written word, with any person, including even any appellate court clerk. Intellectually honest men and women cannot contend that such an order is consistent with the First, the Fifth, the Sixth and the Fourteenth Amendments to the Constitution.

The order in question must also be noted in the context of other directives of the trial judge, given the same March 9, Friday afternoon, after the Court of Appeal closed, and requiring Petitioner to surrender his

property at 9:00 a.m. on the morning of the next court day, before the Court of Appeal could even be approached for a stay preventing Petitioner from soon being in contempt.

The operative effect of all these proceedings was just as they were planned by Real Parties -- to deny Petitioner any meaningful appellate remedy in any forum, and to force Petitioner to choose between: (1) surrendering his files and all copies of those files; and (2) being prima facie in contempt.

No reasonable, present day analysis can accord due process or equal protection with the notion that a person can be held in contempt for merely prosecuting an appeal from the orders of the sort here challenged. Petitioner was "singled out" and successfully prosecuted, with the blight of a "criminal" conviction on his record as a lawyer, solely for refusals to suppress proof of wrongdoing on the part of influential Real Parties.

It is undisputed that California grants open, plenary appellate remedies to persons who commit even the pettiest of crimes, and that the state constitutional appellate process must produce a written, publicly reviewable opinion explaining why the trial court's judgment should endure undisturbed.

It is equally undeniable that the history of this present controversy involved secret hearings that generated the oral orders whose alleged disobedience led to the contempt prosecution; that said criminal prosecution was itself conducted in secret, over Petitioner's objections, without a jury, by another trial-court-level judge who declined to consider any challenges to the original orders that were allegedly violated; that the Court of Appeal allowed no plenary remedy whereby the merits of the trial court's contempt judgment could be reviewed; and that the state Supreme Court did likewise.

In this bicentennial year of the Bill of Rights, this Supreme Court should use this case to hold a lawyer's private files and confidences may not be invaded, seized or sold against his will; to declare the right of jury trial in cases of this sort; to proclaim that due process must necessarily include a meaningful appellate review of any adjudication of criminality; and to rule that equal protection of the laws is not afforded by any state that denies such a trial or review only to citizens prosecuted for a criminal contempt.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges that the writ of certiorari be granted, and that the California Supreme Court be ordered to review Petitioner's case.

Respectfully submitted,

Nick Damer

Nicholas Damer
In Propria Persona

APPENDIX F

EXTRACT FROM THE FIRST COURT OF APPEAL BRIEF (PETITION FOR WRIT OF MANDATE, ET CETERA, 1 CIV. AO49125)

II. The Fourth Amendment of The United States Constitution, And Pertinent State Law As Well, Prohibit The Respondent Court From Issuing Its Order Compelling The Seizure of Petitioner's Case Files And Barring Petitioner From Making Copies of The Same; Likewise, Respondent Court's Unfounded, Indefinitely Extended "Gag" Order Is Forbidden By the First Amendment's Guarantee of Freedom of Speech

....B. As The Case Files [of Petitioner] Containing Petitioner's Work Product And Confidences Constitute Property of Petitioner, The Fourth Amendment Forbids Their Seizure And The First Amendment Permits Their Potential And Appropriate

Post-Trial Dissemination **[thereafter citing several U.S. Supreme Court cases; this first Petition was denied as "premature" since Damer had not yet been held in contempt.]**

EXTRACT FROM THE FIRST PETITION TO THE CALIFORNIA SUPREME COURT (filed in April of 1990, and denied, presumably on grounds of prematurity per New York Times v. Superior Court, by an order signed by Justice Mosk, who voted to grant the final, 1991 petition to the California Supreme Court)

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... (Petitioner also adopts the Table of Contents of the Petition filed in the Court of Appeal (AO49125) and all of the arguments made there.) [Emphasis added.] ... Petitioner can [and did] now present this Supreme Court with ... another copy of the Petition filed March 30 in the Court of Appeal ...

EXTRACT FROM THE SECOND CALIFORNIA COURT OF APPEAL BRIEF (PETITION FOR WRIT OF CERTIORARI, ET CETERA, 1 CIV. AO51211)

IV. MEMORANDUM OF POINTS AND AUTHORITIES

A. THE JUDGMENT OF CONTEMPT MUST BE OVERTURNED IN LIGHT OF THE DENIALS OF CONSTITUTIONAL AND STATUTORY RIGHTS OF DUE PROCESS

This point is discussed at length in the OPPOSITION TO ORDER TO SHOW CAUSE filed August 10, 1990 (see pages 8-11, 15-18, and 31-33 [wherein numerous federal constitutional due process guarantees were noted as pertaining to the contempt matter.])

Real Parties' mid-hearing waiver of imprisonment penalties did not excuse the necessity for a jury trial [citing U.S.v.HAMDAN (1977) 552 F.2D 276]....

E. THE PURPORTED MARCH 9, 1990 "GAG" ORDER IS VOID ON ITS FACE

....the [comprehensive post-trial "gag" order on Petitioner and all trial jurors] would be in clear conflict with [federal] constitutional guarantees ...

... Petitioner incorporates herein, by reference, all materials and arguments provided by him relating to said [original March 30, 1990] Petition [in the Court of Appeal], and requests this Court of take judicial notice of its own files in this regard.

EXTRACT FROM THE SECOND CALIFORNIA SUPREME COURT BRIEF (PETITION FOR WRIT OF REVIEW, CERTIORARI, OR OTHER APPROPRIATE RELIEF)

III. D. THE COURT OF APPEAL'S SUMMARY DENIAL, OF THE ATTEMPT TO OVERTURN A CONVICTION OF CRIMINAL CONTEMPT, VIOLATES PETITIONER'S RIGHTS, UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS, TO THE ISSUANCE OF A WRITTEN OPINION IN A "CAUSE" ON APPEAL, PARTICULARLY WHERE CONSTITUTIONAL OBJECTIONS ARE RAISED

(PLEASE SEE ALSO THE EXTENSIVE APPENDIX E TO THE PETITION FOR WRIT OF CERTIORARI IN THIS CAUSE.)